UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARLINGTON METALS CORPORATION,	)	
	)	
Respondent,	)	
	)	
and	)	**CONSOLIDATED**
	)	
UNITED STEEL, PAPER AND	)	Case No. 13-CA-122273
FORESTRY, RUBBER,	)	Case No. 13-CA-125255
MANUFACTURING, ENERGY,	)	Case No. 13-CA-133055
ALLIED INDUSTRIAL AND SERVICE	)	
WORKERS INTERNATIONAL UNION,	)	
AFL-CIO (USW),	)	
	)	
Charging Party.	)	

REPLY TO THE GENERAL COUNSEL'S ANSWERING BRIEF AND IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

William G. Miossi
Derek G. Barella
Benjamin M. Ostrander
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
wmiossi@winston.com
dbarella@winston.com
bostrander@winston.com
Attorneys for Respondent

"Facts are stubborn things; and whatever may be [one's] wishes, [] inclinations, or the dictates of [] passion, they cannot alter the state of facts and evidence."[1] As AMC explained in its exceptions brief, the ALJ violated this sage maxim by filling the gaping holes in the General Counsel's case with nothing more than speculation and supposition. The General Counsel's answering brief—which merely repeats the ALJ's faulty conclusions, but is riddled with material misrepresentations of the record evidence[2]—fails to salvage the decision.

I. The ALJ's Decision Rests on Legal, Not Credibility, Determinations, and is Therefore Subject to *De Novo* Review

Seeking deferential review of the ALJ's decision, the General Counsel claims the ALJ made "appropriate credibility determinations." GC Ans. Br. at 4. In truth, the material facts are largely undisputed and the ALJ made few credibility determinations, none based on his perception of witness demeanor, notwithstanding his boilerplate that "[i]n making [his] findings regarding the credibility of witnesses, [he] considered their demeanor," ALJD at 2 n.1.

In the few instances where the ALJ was faced with conflicting testimony, he resolved the "disputes" by speculating what the Company was really thinking when it acted or spoke in negotiations or otherwise manufacturing inferences to fit his theory. Such determinations are not entitled to deference, but are subject to *de novo* review. *Damnor Co.*, 260 NLRB 816, 817 n.2 (1982); *see also Permaneer Corp.*, 214 NLRB 367, 389 (1974).

In fact, the ALJ's speculation is plainly contrary to undisputed record evidence. Where evidence existed—even unrebutted evidence—that disproved the "inferences" the ALJ chose to

[1] John Adams, Argument in Defense of the Soldiers in the Boston Massacre Trials, *quoted in* David McCullough, *John Adams*, 68 (Simon & Schuster Paperbacks 2001).

[2] Due to the page limitations, *see* 29 C.F.R. 102.46(h), AMC lacks space to correct all of the General Counsel's misrepresentations of the record. However, the examples set forth herein are sufficient to establish that the General Counsel's arguments are unreliable. The true antidote to this unfortunate tactic, of course, is the record itself, as opposed the General Counsel's characterization and spin.

draw, he simply ignored it. This was manifest error, and the Board should not defer to the ALJ's purported factual findings that run counter to the undisputed evidence of record.

II. The General Counsel Strains to Promote His Theory that AMC's Statements in 2013 on Volume Processed is "In Effect" a Poverty Plea

The General Counsel does not dispute (and the ALJ found) that AMC's chief negotiator Miossi *never* expressed an inability to pay the Union's wage demands. ALJD at 10 n.9. Yet, despite this finding, and overwhelming evidence that Miossi expressly *disavowed* the Company's bargaining position was based on profitability, revenue, costs, or any other financial criterion, Tr. 175–77, 59–60, 345–46, 359–63, 372, 374–75; 450–51; GC 5 at 2; GC 12, GC 13 at 1–2, R. 15 at 2; R. 16, R. 20, the General Counsel maintains (and the ALJ found) the Company *effectively* said as much when it referenced processed tons of steel. GC Ans. Br. at 14–18.

This theory fails because the General Counsel and Union concede the processed volume threshold was unrelated to profitability. GC Ans. Br. at 11 (arguing AMC's 180,000-ton threshold "had no basis in operating costs or profitability"); USW Ans. Br. at 24 & n.1 (conceding production tonnage "did not correspond" to profits and losses). Yet, neither explains how maintaining a bargaining position admittedly unrelated to profitability conveyed an inability to pay, particularly given Miossi's express repudiation of that very proposition no less than six times in 2013-2014, including at the two bargaining sessions at issue. GC 13–15; R. 15–16.

The General Counsel attempts to shore up this gap in logic by stitching together a smattering of statements made over four years earlier, which purportedly provide "context" for the exact opposite statements made during the 2013 bargaining sessions.[3] Tr. 450–51. In early 2009,

[3] The General Counsel has no answer to AMC's argument that to the extent the ALJ's decision is based on statements the Company made in 2009, it is (a) contrary to the Complaint, which alleges the Company failed to produce financial information in *2013*; (b) contrary to prior determinations by the Region and the General Counsel that the Company's assertions in bargaining in 2009 did not obligate it to turn over financial information; and (c) contrary to Section 10(b) of the Act. 29 U.S.C. § 160(b).

AMC told the Union it was losing money and its condition was "dire" (and subsequently produced financial information to substantiate its assertion). However, the Complaint in this matter alleges that AMC violated the Act by refusing to provide financial information requested by the Union on December 11, 2013. This claim requires an assessment of AMC's expressed bargaining position *at the time the Union's request was made*. *Mary Thompson Hosp.*, 296 NLRB 1245, 1250 (1989) ("The right of the union to the information requested must be determined by the situation which existed at the time the request was made."), *enf'd*, 943 F.2d 741 (7th Cir. 1991). At the time the financial information request was made in December 2013, Miossi was clear and unequivocal in basing AMC's bargaining position on volume (annual tonnage processed) and lack of employee turnover, *not* profitability or any financial consideration. The General Counsel's unsubstantiated inference that Miossi's 2013 statement that "business conditions had not changed" somehow resuscitated comments he made four years prior is untenable given Miossi's explanation at the table that his comments were based on tonnage volume and nothing else. Tr. 360–61; 450–51.

Application of these facts to controlling Board law makes plain that Miossi's statements that "nothing had changed" did not equate to a poverty plea or otherwise give rise to an obligation to turn over privately held financial records in response to the Union's December 11, 2013 requests. *See AMF Trucking & Warehouse, Inc.*, 342 NLRB 1125 (2004).[4] Miossi's statement was in reference to the loss of volume, which remained down over 30%. CP 1; GC 12; R. 6; R. 19.

III. The General Counsel Fails to Show AMC Claimed an Inability to Pay Under the New Standard He Urges the Board to Create

During opening statements at trial, the General Counsel conceded that to find AMC asserted an inability to pay would require the ALJ to "redefine" precedent. Tr. 18–19. The

[4] The General Counsel's reliance on *Stella D'oro Biscuit Co.*, 355 NLRB 769, 769 (2010), *ConAgra, Inc.*, 321 NRLB 944, 944 (1996), *enf't denied*, 117 F.3d 1435 (D.C. Cir. 1997), and *Shell Co.*, 313 NLRB 113, 134 (1993) is misplaced, as statements in those cases expressly tied bargaining positions to the "survival" of the company. AMC made no such statement.

General Counsel's brief ends where he began – his theory of the case requires a departure from nearly 70 years of precedent and the adoption of a new standard requiring an employer to open its books whenever "it puts in issue its ability to afford the union's demands." GC Ans. Br. at 26. Not only is this wishful standard inconsistent with *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), its application here still does not result in a finding that the Union is entitled to inspect AMC's privately held financial records. Despite conflating different business metrics such as profit, costs, and volume, the General Counsel cannot avoid the uncontroverted record, which establishes the Company's bargaining position was never based on a single economic criterion that the Union targeted with its extraordinary December 2013 information requests.

IV. The General Counsel Fails to Tie Any Unanswered Information Request to a Position Taken by AMC in Bargaining

The General Counsel's argument that AMC was alternatively required to turn over the financial and other information requested by the Union in December 2013, fares no better as the information requests are untethered to AMC's actual bargaining position. Tr. 450–51. No information beyond the tonnage and revenue information, which was provided regularly to the Union dating back to 2009, was necessary for the Union to assess the accuracy of AMC's bargaining position or the alleged assertions that product demand and pricing were down.

Without a single citation to the record, the General Counsel contends AMC based its bargaining position on increased costs and competition for business. GC's Ans. Br. at 19. First, the record is clear that AMC did not predicate any bargaining position on cost or competition, and any discussion of these topics was prompted by questions posed on the fly by the Union's chief negotiator, and not by Miossi to substantiate any position stated by the Company. R. 15–16; Tr. 360–62, 450–51. The Complaint does not even allege AMC failed to provide cost information or information related to competitors. GC 1(q). For these reasons, the cases cited by

the General Counsel and Union are inapposite. *See Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006) (requests for cost and competitor data were relevant to company's bargaining positions based on competitiveness and production costs; emphasizing "the Charging Party's requests were narrowly tailored in response to the Respondent's own claims—the Charging Party did not request generalized financial information, such as the Respondent's profits, net income, tax returns, salary information, or administrative expenses").

Not only are the General Counsel's, Union's, and ALJ's attempted explanations of the relevance of the information at issue inconsistent with *Caldwell*, they strain the bounds of credulity. The General Counsel asserts the Union was entitled to AMC's federal and state tax returns to assess the accuracy of purported statements that competitors were trying to take business from AMC. GC Ans. Br. at 20. What the General Counsel fails to explain is how that information could possibly be gleaned from a tax return. Similarly, the Union offers only a Clintonesque "it's relevant because it's relevant" *non sequitur*,[5] stating that information regarding the Company's cost-savings measures (which AMC did provide, *see* GC 12–13) will allow the Union to understand and respond to the Company's wage proposals. USW Ans. Br. at 25.

V. AMC Did Not Provide Misleading or Incomplete Tonnage and Revenue Information Related to the Bargaining Unit

In support of the ALJ's finding that AMC provided misleading or incomplete tonnage and revenue information as it excluded "metal sales," the General Counsel merely states that the bargaining unit was certified as a wall-to-wall unit. GC Ans. Br. at 21. Yet, the General Counsel does not address, much less rebut, the uncontroverted testimony of AMC's Executive Vice President that 100% of the bargaining unit work at the Franklin Park facility is on the toll-

[5] "I never took a position on Keystone until I took a position on Keystone." *Debate Takeaways*, Thomas and Riccardi, AP (Oct. 14, 2015), *available at* https://www.washingtonpost.com/politics/debate-takeaways-clinton-on-offense-defuses-email-issue/2015/10/13/f963158c-7225-11e5-ba14-318f8e87a2fc_story.html.

processing side of the business. Tr. 100. Thus, when the Company measured the volume production and revenue generated by the bargaining unit at the plant, it did so by reference to the toll processing division, for which it provided accurate and complete information.

VI. The General Counsel Fails to Show AMC Bargained in Bad Faith

In attempting to defend the ALJ's conclusion that AMC engaged in surface bargaining at two bargaining meetings in 2013, it is remarkable what the General Counsel does *not* dispute:

- AMC met with the Union 39 times negotiations and reached written tentative agreements on more than 90 percent of the terms of an overall labor agreement. R. 3, 4; Tr. 324–29, 341–42.

- AMC met at times and places dictated by the Union, placed no restrictions on topics it would discuss, made and responded to proposals, provided reams of information, and modified its positions. At no time did AMC withdraw from tentative agreements, walk out of bargaining meetings, or bypass Union agents. Tr. 326–29.

- Twice the parties reached impasse and the Company unilaterally implemented its last, best, and final proposals. Following the first implementation in 2009, the Company made still further proposals and engaged in additional bargaining throughout the majority of 2011. During the 10 to 12 bargaining sessions that occurred in 2011, AMC proposed modifications to the existing implemented terms and modified its position on numerous topics. Still unable to reach a final labor agreement, AMC declared impasse for a second time on December 7, 2011, and implemented its revised last, best, and final offer on January 1, 2012. Tr. 331–32, 335–37; R. 3.

- On each occasion AMC declared impasse and implemented its final offer, the General Counsel vindicated AMC's action, finding no bad faith bargaining.[6] GC 2B, 2E; Tr. 334–37.

Feigning ignorance of the record, the General Counsel cites a laundry list of factors as supportive of the ALJ's finding that AMC engaged in surface bargaining, "including unreasonable bargaining demands, delaying tactics, efforts to bypass the bargaining representative, failing to provide relevant information and unlawful conduct away from the table." GC Ans. Br. 6. Yet, the General Counsel has never claimed, and the ALJ did not find, that AMC did any of these things.

[6] The General Counsel curiously argues these dismissals by the Region and affirmances by the General Counsel have no precedential value, *see* GC Ans. Br. at 5, while simultaneously attempting to smear the Company as a serial labor law violator by pointing to scores of unfair labor practice charges filed by the Union between 2009 to 2013, *see* GC Ans. Br. at 3–4, not a single one of which resulted in a finding that AMC engaged in a single unfair labor practice.

Instead, the ALJ's surface bargaining finding rests exclusively on three faulty premises: (a) AMC failed to provide the financial information requested by the Union; (b) AMC provided the Union with incomplete and misleading information on processed tonnage[7]; and (c) during 2013 bargaining, AMC refused to consider anything more than a minor modification to the 2012 implemented terms. ALJD 28–30; GC Ans. Br. 6. Each of these canards are quickly dispelled.

First, as explained above and in AMC's opening brief, the processed tonnage data that AMC produced accurately measured all work done by the bargaining unit. This is undisputed.

Second, the General Counsel adopts the ALJ's tortured reasoning that during the two bargaining meeting in 2013 (which lasted 90 and 45 minutes, respectively, both of which the Union adjourned, *see* Tr. 146, 162, 211, 317, 366, 372, 375; GC 5, 10; R. 15–16), the Union made "substantial attempts to reach an agreement." GC Ans. Br. at 7; ALJD at 29–30. This argument is belied by uncontroverted record evidence that the Union's solitary proposal in 2013 was nearly identical, and – if anything, was regressive from its most recent proposal in 2012 – a proposal AMC rejected eighteen months prior. Tr. 364–67; GC 8; R. 8. The Union's "new" proposal consisted of seven elements, one of which AMC agreed to, and another of which was a demand to arbitrate Ceja's discharge, which the Company rejected not six weeks prior. Tr. 203–04, 370–71; GC 8; GC 9. The remaining five elements were repackaged versions of the same proposals AMC rejected prior to impasse. R. 8; GC 8. Indeed, the Union's wage proposal only widened the gap:

Union's March 15, 2012 Proposal (R 8.)	**Union's Eleventh Economic Proposal (GC 8.)**
Restoration of previous wages	Restoration of previous wages
$1,000 payment upon ratification	$1,000 payment f upon ratification

[7] The General Counsel misrepresents the record by stating that tonnage data was the "only" information AMC provided to the Union in response to its requests. GC Ans. Br. at 6. Beyond the extensive tonnage and revenue information AMC provided dating back to 2009 (which was accurate), the record shows that on October 30, 2013, AMC also produced detailed current census data, including addresses, phone numbers, dates of hire, job and rate of pay, and participation in the group insurance plan. Tr. 355; R. 6. Further, on December 16, 2013, AMC provided to the Union information relating to cost savings, even though it never predicated its bargaining position on cost saving. GC 12.

Modify starting pay to equal an amount above the State minimum	Modify starting pay to equal an amount above the State minimum
Year one wage increase of 40 cents per hour	Year one wage increase of 35 cents per hour
Year two wage increase of 46 cents per hour	Year two wage increase of 40 cents per hour
	Year three wage increase of 3 percent

The General Counsel argues the Union's new proposal was a "substantial attempt" to reach agreement because "the Union offered to waive its request for a wage increase for a lump sum of $1,000 upon ratification or a profit-sharing program." GC Ans. Br. at 8. But the clear terms of the proposal called for a $1,000 lump sum payment upon ratification *and* the restoration of wages previously in effect and general wage increases. GC 8. Similarly, while the Union's chief negotiator inquired into the possibility of a profit-sharing program and matching 401(k) contributions, bargaining notes show Miossi invited the Union to make a proposal, but the Union never did. R. 15. The General Counsel's argument that at the parties' 38th bargaining meeting, AMC's failure accede to a proposal that was regressive from one it had previously rejected constitutes "stonewalling" cannot be squared with the evidence or governing law.

VII. The General Counsel Provides No Meaningful Answer to AMC's Showing the Withdrawal Petition Was Not "Tainted"

The General Counsel does not dispute that if the ALJ erred in finding each independent violation, he also erred in finding the employee petition was tainted. Nor does the General Counsel distinguish controlling Board precedent showing the attenuated unfair labor practice allegations are not the hallmark violations that are coercive or likely to remain in the employees' memories (assuming they were even aware of the allegations). *See Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013); *Goya Foods of Fla.*, 347 NLRB 1118, 1121 (2006).

Rather, in conclusory fashion, the General Counsel asserts the ALJ properly *assumed* a causal relationship between dated but still pending unfair labor practice charges and the petition to withdraw. However, the General Counsel must carry his burden of demonstrating violations

of federal law by offering evidence, not speculation. Where the General Counsel argues that unfair labor practices tainted a disaffection petition, it was incumbent upon the General Counsel to prove the alleged unlawful practices had a causal effect on the petition. Yet, he offered no evidence to establish that any bargaining unit member was aware of any pending unfair labor practice allegation, much less provide any support for his bald assertion that AMC's conduct "had a detrimental and lasting effect on employees." GC Ans. Br. at 22. Given this failure, the ALJ's findings lack evidentiary support. *See* AMC's Ex. Br. at 44–47. And the General Counsel's conclusory endorsement in his answering brief of the ALJ's unsupported findings does nothing to rectify that fatal shortcoming.

The General Counsel attempts to salvage the ALJ's faulty reasoning by misstating the record and plying yet more speculation. The General Counsel claims that two bargaining unit employees – neither of whom signed the petition – were present at the October 31 and December 11 bargaining sessions and speculates they were "well aware" of AMC's purported unlawful conduct. This is an extraordinary overstatement of the record. *First*, the conduct underlying two out of the three alleged unfair labor practices that purportedly "tainted" the petition occurred before or after the October 31 and December 11 bargaining sessions, and the record is devoid of evidence these two unit members had even the slightest knowledge of them. *Second*, there is no evidence that any petition signer was aware of any allegations of unfair labor practices.

VIII. The General Counsel's Arguments Concerning AMC's Authentication of the Petition Ignores and Blatantly Misstates the Record and Board Law

The General Counsel's Answering Brief to Intervenor's Exceptions concedes, for the third time in this litigation,: "[t]he Complaint does not allege any violation with regard to the 'validity' of the employee petition." GC Ans. Br. to Intervenor at 3; *see also* GC 1(k) at 4; Tr. 107.

Nor does the General Counsel attempt to reconcile the ALJ's finding that AMC had an affirmative duty to authenticate an admittedly authentic disaffection petition prior to its withdrawal of recognition with Board authority, which unequivocally holds that an employer's obligation to present evidence of authentication *only* arises where the General Counsel comes forward with evidence rebutting the initial showing a union has lost actual support through a disaffection petition. *See, e.g., Levitz Furniture Co. of the Pac.*, 333 NLRB 717, 725 n.49 (2001).

And like the ALJ, in arguing AMC failed as a factual matter to authenticate the petition, General Counsel resorts to rank speculation. As detailed in AMC's opening brief, Mr. Orlowski testified without contradiction that he recognized ***all*** of the names on the petition before the withdrawal of recognition, Tr. 101–02, 105–06. The ALJ erroneously surmised that because Orlowski testified he had not seen the signatures of newer employees "very often," he was, therefore, wholly unfamiliar with six signatures of employees hired in the year prior to the withdrawal. ALJD at 34. The General Counsel and Union take the ALJ's flawed analysis one step further and represent to the Board that Orlowski "testified" that he was not familiar with the signatures of six employees on the petition who had been hired in 2013. GC Ans. Br. at 23; Union Ans. Br. at 15. This is a naked misstatement of the record evidence that typifies – sadly – the General Counsel's and the Union's arguments throughout. Tr. 101–02, 105–06.

CONCLUSION

For the reasons stated in AMC's opening brief and above, the ALJ's findings that AMC violated the Act should be reversed and the Consolidated Complaint dismissed.

Dated: October 16, 2015

Respectfully submitted,

ARLINGTON METALS CORPORATION

By: /s/ Derek G. Barella

One of Its Attorneys

William G. Miossi
Derek G. Barella
Benjamin M. Ostrander
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600
wmiossi@winston.com
dbarella@winston.com
bostrander@winston.com

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Respondent, hereby certifies that he has caused a true and correct copy of the foregoing Reply in Support of Respondent's Exceptions to be served upon:

via electronic and regular mail:

Daniel E. Murphy, Esq.
Melinda Hensel, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 13
209 S. LaSalle Street, Suite 900
Chicago, IL 60604
Daniel.Murphy@nlrb.gov
Melinda.Hensel@nlrb.gov

Peter Sung Ohr
Regional Director
National Labor Relations Board, Region 9
209 S. LaSalle Street, Suite 900
Chicago, IL 60604
peter.ohr@nlrb.gov

Stephen A. Yokich, Esq.
Cornfield and Feldman
25 East Washington Street, Suite 1400
Chicago, IL 60602
syokich@cornfieldandfeldman.com

Katharine J. Shaw, Esq.
United Steelworkers
60 Boulevard of the Allies
Five Gateway Center – Suite 807
Pittsburgh, PA 15222
kshaw@usw.org

Dowd, Block, Bennett, Cervone, Auerbach & Yokich
8 South Michigan Avenue
Chicago, IL 60603

via e-filing:

Gary Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

via electronic mail where indicated and U.S. Mail, first-class postage prepaid, this 16th day of October, 2015.

/s/ Derek G. Barella
Derek G. Barella